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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

against - *Petitioner,*

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DeGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY AND JESUS ECHEVARRIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

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INDEX

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Jurisdictional statement	4
Question presented	5
Reasons relied on for granting the writ	5
Prayer for writ	9
Brief in support of petition for writ of certiorari	9
Opinions of courts below	9
Jurisdiction	9
Statement of the case	10
Specification of errors	10
Relevant provisions of statutes involved	10
Argument	11
Point I—The Circuit Court of Appeals for the Second Circuit has rendered a decision in the case at bar in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit on the same matter in the case of Rucker v. First. Nat. Bank of Miami, Okla., 138 F. (2d) 699, certiorari denied, 321 U. S. 769	11
Point II—The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in conflict with the reasoning of the Court in the case of Kirschbaum Co. v. Walling, 316 U. S. 517, and with the reasoning of decisions of various Circuit Courts of Appeal and of the United States District Courts	15
Point III—The Circuit Court of Appeals for the Second Circuit has decided an important question of federal law which has not been, but should be, settled by this Court	22
Conclusion	24

Table of Cases Cited

Baldwin v. *Emigrant Industrial Savings Bank*, U. S. District Court, Southern District of New York, 7 WHR 831, not officially reported	6, 20
Blumenthal v. *Girard Trust Co.*, 141 F. (2d) 849, C.C.A. 3	6, 19

Page

Brandel v. *Continental Illinois Nat. Bank & T. Co.*, 43 F. Supp. 781 6,20

Building Service Employees International Union v. *Trenton Trust Company*, 142 F. (2d) 257, C.C.A. 3 . . 6,19

Callus v. *10 East Fortieth Street Building, Inc.*, 51 F. Supp. 528 6,19,20

Cochran v. *Florida Nat. Bldg. Corporation*, 45 F. Supp. 830, aff'd 134 F. (2d) 615, C.C.A. 5 6,19

Convey v. *Omaha Nat. Bank*, 140 F. (2d) 640, C.C.A. 8, certiorari denied 321 U. S. 78 5,19,20,21

Cullen v. *Stone & Webster*, U. S. District Court, Southern District of New York, 7 WHR 147, not officially reported 6,20

Hinkler v. *Eighty-Three Maiden Lane Corporation*, 50 F. Supp. 263 6,19

Johnson v. *Dallas Downtown Development Co.*, 132 F. (2d) 287, C.C.A. 5, certiorari denied 318 U. S. 790 . 5,19,20

Johnson v. *Masonic Bldg. Co.*, 138 F. (2d) 817, C.C.A. 5, certiorari denied 321 U. S. 780 5,19,20

Kirschbaum Co. v. *Walling*, 316 U. S. 517 . 5,6,16,17,18,19,22

Lofther v. *First Nat. Bank of Chicago*, 48 F. Supp. 692, aff'd 138 F. (2d) 299, C.C.A. 7 5,19

McLeod v. *Threlkeld*, 319 U. S. 491 18

Noonan v. *Fruco Const. Co.*, 140 F. (2d) 633, C.C.A. 8 . . 6

Rosenberg v. *Semeria*, 137 F. (2d) 742, C.C.A. 9, certiorari denied *sub. nom.* Semerio et al v Rosenberg, 320 U. S. 770 5,19,21

Rucker v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C.C.A. 10, certiorari denied 321 U. S. 769, 5,11,14,15,19,20

Stoike v. *First Nat. Bank of City of New York*, 290 N. Y. 195, certiorari denied 320 U. S. 762 5,19,20

Tate v. *Empire Building Corporation*, U. S. District Court, Eastern District of Tennessee, 2 WH cases, 472, not officially reported, aff'd 135 F. (2d) 743, C.C.A. 6, certiorari denied 320 U. S. 766 5,19,21

Walton v. *Southern Package Corp.*, 320 U. S. 540 5,22

Wideman v. *Blanchard & Calhoun Realty Co.*, 50 F. Supp. 626 6,20

TABLE OF STATUTES CITED

	Page
Fair Labor Standards Act of 1938 (act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C., Sec. 201–219)	5, 10
Sec. 3(b)	10
Sec. 3(j)	10
Sec. 7(a)	2
Judicial Code, Section 240, as amended (act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U.S.C., Title 28, Sec. 347)	4, 5, 10

SUPREME COURT OF THE UNITED STATES

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No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY AND JESUS ECHEVARRIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, The Borden Company, respectfully shows:

Summary Statement of the Matter Involved

The Circuit Court of Appeals for the Second Circuit ruled, by a divided court, that building service and main-

tenance employees, namely, porters, watchmen and elevator operators, employed by petitioner, The Borden Company, in its office building at 350 Madison Avenue, in the City of New York, are engaged in the production of goods for commerce within the meaning of Section 7 (a) of the Fair Labor Standards Act of 1938 (Section 7, 52 Stat. 1060, June 25, 1938, 29 U. S. C., Section 207 (a)) and, therefore, entitled to overtime compensation under such Act (R. 128-132).

The ruling was made in reversing a judgment of the United States District Court for the Southern District of New York, which judgment was in favor of the petitioner and against the respondents on the issues in the action on the merits (R. 121-122). The theory of said ruling was that, though respondents had no relationship or tie with actual production of goods, they were engaged in production because their work was "necessary" to the executives, accountants and other employees of The Borden Company whose office work in turn was necessary for the production of The Borden Company's products in distant places.

Such judgment of the District Court was rendered in an action brought by the respondents who claimed in their complaint that they were engaged in commerce and the production of goods for commerce and entitled to recover overtime compensation and reasonable counsel fees under the Fair Labor Standards Act of 1938 (R. 3-6). The petitioner interposed an answer in which it denied that the respondents were engaged in commerce or the production of goods for commerce, and asserted that no manufacturing was done in the building owned by petitioner in which respondents were employed, that no goods were produced for commerce in such building and that the respondents were not covered by the Fair Labor Standards Act of 1938 (R. 7-11).

The Circuit Court of Appeals' order for mandate (R. 135) and its mandate were both made August 18, 1944.

The majority opinion (R. 128-132), written by Circuit Judge Learned Hand and concurred in by Circuit Judge Charles E. Clark, and the dissenting opinion (R. 132) of Circuit Judge Thomas W. Swan are not yet reported. The opinion of District Judge Edward A. Conger (R. 102-106) before whom the case was tried without a jury is reported (52 F. Supp. 952).

Petitioner, a New Jersey corporation, owns a twenty-four story office building at No. 350 Madison Avenue, in the City, County and State of New York (R. 117, 128), in which it maintains its home office, and it occupies in whole or in part approximately seventeen of the twenty-four floors and 58% of the total rentable area (R. 118, 128).

The remainder of the building is occupied by various tenants who do not produce, manufacture, handle, process or in any other manner work on any goods in said building (R. 119, 120, 129).

While petitioner's business is that of processing, manufacturing, selling and distributing fluid, condensed and evaporated milk, casein, ice cream, butter, cheese and various other products (R. 117, 128) such activities are not carried on in its office building involved in this case. In other words, to use the language of the Statute, petitioner does not produce, manufacture, handle, process, or in any other manner work on any goods in said office building (R. 119, 129). Such activities are carried on in various plants and factories of the petitioner throughout the United States and Canada (R. 117, 128).

The President, executive vice-president, vice presidents, treasurer and assistant treasurers, secretary and assistant secretaries, and other officers and subordinate employees of the petitioner are housed in said building, and the Board

of Directors of the petitioner holds its regular and special meetings therein (R. 118, 129-130).

The petitioner directs, supervises, manages and controls its entire business through the aforesaid directors, officers and employees (R. 118, 128).

In this building much of the advertising is devised, though none of it is printed there (R. 118, 129). Labels for petitioner's products are designed in this building and some of the photostating takes place there (R. 119, 129).

The respondents are building maintenance employees, namely, porters, elevator operators and watchmen, who are employed in the operation and maintenance of petitioner's office building (R. 118, 129).

The Circuit Court of Appeals accepted and adopted the facts as found by the Trial Judge (R. 117-120, 128, 129).

While the respondents claimed that they were engaged in commerce and also in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, (R. 5) the Circuit Court of Appeals held that they were not engaged in commerce (R. 129) but were engaged in the production of goods for commerce (R. 129-132).

Application has not been made for reargument, reconsideration or rehearing in respect of the decision of the Circuit Court of Appeals for the Second Circuit.

Petitioner presents to this Court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Circuit Court of Appeals for the Second Circuit.

Jurisdictional Statement

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517,

Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347).

Question Presented

The question presented is whether the respondents were engaged in—whether their office building maintenance activities were "necessary" to—production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 (52 Stat. 1060, June 25, 1938, 29 U. S. C., Sec. 201-219).

Reasons Relied on For Granting the Writ

This Court is requested to grant the writ for the following reasons:

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied 321 U. S. 769; and is in conflict with the reasoning of the decisions in the cases of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Lofther* v. *First Nat. Bank of Chicago*, 48 F. Supp. 692, aff'd 138 F. (2d) 299, C. C. A. 7; *Stoike* v. *First Nat. Bank of City of New York*, 290 N. Y. 195, certiorari denied 320 U. S. 762; *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 817, C. C. A. 5, certiorari denied 321 U. S. 780; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287, C. C. A. 5, certiorari denied 318 U. S. 790; *Convey* v. *Omaha Nat. Bank*, 140 F. (2d) 640, C. C. A. 8, certiorari denied 321 U. S. 78; *Tate* v. *Empire Building Corporation*, U. S. District Court, Eastern District of Tennessee, 2 WH cases, 472, not officially reported, aff'd 135 F. (2d) 743, C. C. A. 6, certiorari denied 320 U. S. 766; *Rosenberg* v. *Semeria*, 137 F. (2d) 742, C. C. A. 9, certiorari denied,

sub nom. Semerio et al v. *Rosenberg,* 320 U. S. 770; *Cochran* v. *Florida Nat. Bldg. Corporation,* 45 F. Supp. 830, aff'd 134 F. (2d) 615, C. C. A. 5; *Noonan* v. *Fruco Const. Co.,* 140 F. (2d) 633, C. C. A. 8; *Blumenthal* v. *Girard Trust Co.,* 141 F. (2d) 849; C. C. A. 3; *Building Service Employees International Union* v. *Trenton Trust Company,* 142 F. (2d) 257, C. C. A. 3; *Hinkler* v. *Eighty-Three Maiden Lane Corporation,* 50 F. Supp. 263; *Callus* v. *10 East Fortieth Street Building, Inc.,* 51 F. Supp. 528; *Cullen* v. *Stone & Webster,* U. S. District Court, Southern District of New York, 7 WHR 147, not officially reported; *Brandel* v. *Continental Illinois Nat. Bank & T. Co.,* 43 F. Supp. 781; *Baldwin* v. *Emigrant Industrial Savings Bank,* U. S. District Court, Southern District of New York, 7 WHR 831, not officially reported; *Wideman* v. *Blanchard & Calhoun Realty Co.,* 50 F. Supp. 626.

In all of the aforesaid cases in which certiorari has been denied, the decisions were in favor of the employer and to the effect that office building service maintenance employees were not covered by the Fair Labor Standards Act of 1938. Search of the authorities reveals no State decisions in conflict with the listed Federal cases.

2. The decision of the Circuit Court of Appeals herein involves an important question of Federal law which has not been but which should be settled by this Court. The ruling of this Court in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, dealt with building service and maintenance employees of a loft building whose tenants were engaged principally in the production of goods for commerce in the building. There are, however, thousands of office buildings where no production takes place housing tenants engaged in the production of goods wholly outside of and apart from such buildings. The owners of such office buildings are vitally interested in the question of whether

or not their building service and maintenance employees are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. If they are, such owners are faced with liability retroactive to October 24, 1938 in hundreds of millions of dollars, despite their reliance upon earlier rulings as to the scope of the commerce power and later the ruling of this Court in the *Kirschbaum* case and the numerous cases decided in favor of building owners in which cases this Court denied certiorari. This Court has not yet ruled on the question of liability of such owners.

Prayer for Writ

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., November 9, 1944.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

The opinion of the District Court (R. 102-106) is reported in 52 F. Supp. 952.

The majority and dissenting opinions of the Circuit Court of Appeals, Second Circuit (R. 128-132) are not yet reported.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Sec-

tion 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C., Title 28, Sec. 347).

The Circuit Cuort of Appeals' order for mandate (R. 133) and its mandate were both made August 18, 1944.

Application has not been made for reargument, reconsideration or rehearing in respect of the decision of the Circuit Court of Appeals for the Second Circuit.

Statement of Case

A sufficient statement of the case will be found in the accompanying petition and in the interest of brevity will not be repeated.

Specification of Errors

The Circuit Court of Appeals for the Second Circuit erred in holding that the respondents were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

Relevant Provisions of Statutes Involved

Fair Labor Standards Act of 1938—(Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201-219).

"Sec. 3. As used in this Act—

* * * * * * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." (29 U. S. C. § 203(b))

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the

production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." (29 U. S. C. § 203(j))

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (29 U. S. C. §207(a))

ARGUMENT

POINT I

The Circuit Court of Appeals for the Second Circuit Has Rendered a Decision in the Case at Bar Avowedly in Conflict with the Decision of the Circuit Court of Appeals for the Tenth Circuit on the Same Matter in the Case of Rucker v. First Nat. Bank of Miami, Okl., 138 F. (2d) 699, Certiorari Denied, 321 U. S. 769.

In the case of *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied, 321 U. S. 769, the plaintiffs who were elevator operators in a six-story office building, owned and operated by the defendant, instituted an action to recover overtime com-

pensation and liquidated damages claimed to be due them under the provisions of the Fair Labor Standards Act of 1938. The first floor of this building was used by the defendant to carry on a national banking business. The remaining floors were leased to various tenants. Some of these tenants, apparently occupying a considerable part of the building's rentable area, were companies elsewhere engaged in the production of goods for commerce which used the space leased by them solely for the purpose of housing their executive and administrative offices; the other tenants were engaged in interstate and intrastate commerce; none of the tenants, however, were shown to have been engaged in the production of goods in the building. The plaintiffs conveyed the tenents and the public to and from the upper floors in the building.

The Circuit Court of Appeals, Tenth Circuit, held that the plaintiffs were not engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 and affirmed a judgment of the United States District Court dismissing the plaintiffs' complaint.

In that case the Circuit Court of Appeals, Tenth Circuit, found that the building there was occupied by the executive offices of tenants elsewhere engaged in the production of goods for commerce. Referring to this type of occupancy, the court said:

> "Specifically, we are urged to hold that these employees, as evevator operators, were engaged in the production of goods for commerce on the authority of Kirschbaum Co. *v.* Walling, supra. In that case the court held that elevator operators and other building employees were engaged in the production of goods for commerce, because the services which they performed were so closely and intimately associated with the actual production of goods for commerce as to be in reality a part of the process. There, concededly, the tenants occupying the building were actually engaged in the

production of goods for interstate commerce, and the elevator operators in the building ran both the freight elevators which started and finished the interstate journeys of goods going from and coming to the tenants, and the passenger elevators which carried employees, customers, salesmen and vistors. In holding that elevator operators, under these facts, were engaged in the production of goods for commerce, the court said [316 U. S. 517, 62 S. Ct. 1121, 86 L. Ed. 1638]: 'in our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce."' But, the court significantly observed that the criterion was necessarily one of degree and must be so considered in defining coverage under the phrase 'production of goods for commerce.' See, also, Warren-Bradshaw *v.* Hall, supra; Walling *v.* Patton-Tulley Transp. Co., 6 Cir., 134 F. 2d 945; Hanson *v.* Lagerstrom, 8 Cir., 133 F. 2d 120, and Consolidated Timber Co. *v.* Womack, 9 Cir., 132 F. 2d 101.

"But the facts before us which bear upon the phrase 'production of goods for commerce' are only remotely analogous to the facts in the Kirschbaum case. The executive and administrative offices of the mining and smelting company were located in the building serviced by the elevator operators, and this company was doubtless engaged in the production of goods for commerce, but it is not shown on this record whether any of the goods were produced in the building, or that any of the employees transported to and from the offices are directly or indirectly engaged in the production of the goods. The same is true of the chat and crushed rock company, and the abstract company, which produced abstracts, some of which were shipped in interstate commerce. In any event, the relationship is not shown to be 'close and immediate.' Under these facts it cannot be said that the activities of the elevator

operators were an essential part of, or necessary to, the production of goods for commerce." (pp. 701, 702).

The petitioner in the case at bar is not engaged in the production of goods in its office building (R. 119, 129) but it is so engaged elsewhere (R. 117, 128); the other tenants are not engaged in the production of goods in the building (R. 119, 120, 129). In the case at bar and in the case of *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F (2d) 699, C. C. A. 10 certiorari denied 321 U. S. 769, it was not shown that there was any production of goods for commerce in the respective buildings involved although there was production of goods elsewhere, yet the Circuit Court of Appeals for the Second Circuit and the Circuit Court of Appeals for the Tenth Circuit arrived at directly opposite conclusions and the decisions are in conflict.

The majority opinion of the Circuit Court of Appeals, Second Circuit recognized the existence of this conflict in the following part of its opinion:

> "In the case at bar we start with the datum that employees like the plaintiffs are 'engaged in production' when they care for the quarters of those who manufacture the goods, or handle them. *A. B. Kirschbaum Co.* v. *Walling*, Administrator, supra (316 U. S. 517). That is because those who make or handle them are so engaged, and because the caretakers' work is 'necessary' to their activities (§203 (j), Title 29 U. S. Code). We are to ask ourselves whether the purpose which included caretakers in that situation, included caretakers in this. Indeed, in one respect the plaintiffs are nearer to 'production' than were the employees in *A. B. Kirschbaum Co.* v. *Walling*, Administrator, *supra* (316 U. S. 517); for they were employed directly by the manufacturer, instead of by the manufacturer's lessor. On the other hand, they are further from 'production', if production must be confined to actual contact with the raw material, or the finished goods. *The Tenth Circuit thought that that further removed*

was enough to take them outside the statute. Rucker v. *First National Bank of Miami, Okl.*, 138 F. (2d) 699, 702 (2nd Col.)." (Italics ours)

The Circuit Court of Appeals, Second Circuit, on the other hand, thought that such further removal of the respondents from the production of goods for commerce was not enough to place them outside the statute. It is obvious, therefore, that these decisions are in conflict.

The dissenting opinion in the case at bar, however, followed the ruling in the case of *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied 321 U. S. 769. Judge Swan said:

> "I think the judgment should be affirmed. Section 3 of the Act, 29 U. S. C. A. § 203 (j), provides that 'for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof.' In my opinion the porters, elevator operators, and night watchmen of the defendant's office building are too remotely related to 'the production' of goods for commerce to be within the coverage of the Act. Rucker v. First Nat. Bank. of Miami, Okl., 138 F. 2d 699, 702 (C. C. A. 10)."

Point II

The Decision of the Circuit Court of Appeals for the Second Circuit in the Case at Bar is in Conflict with the Reasoning of the Court in the Case of Kirschbaum Co. v. Walling, 316 U. S. 517, and with the Reasoning of Decisions of Various Circuit Courts of Appeal and of United States District Courts.

This court has observed a well-defined line of reasoning in cases involving the determination of the question whether

a given employee comes within the purview of the Fair Labor Standards Act of 1938. This line of reasoning is exemplified in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. In the *Kirschbaum* case this Court in its opinion, among other things, said:

> "Since the scope of the Act is not coextensive with the limits of the power of Congress over commerce, the question remains whether these employees fall within the statutory definition of employees 'engaged in commerce or in the production of goods for commerce,' construed as the provision must be in the context of the history of federal absorption of governmental authority over industrial enterprise. In this task of construction, we are without the aid afforded by a preliminary administrative process for determining whether the particular situation is within the regulated area. Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations. Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn. The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there. To that end we have tried to state with candor the larger considerations of national policy, legislative history, and administrative practicalities that underlie the variations in the terms of Congressional commercial regulatory measures and which therefore should govern their judicial construction." (p. 523)

In the same case this Court further said:

"We cannot, in construing the work 'necessary,' escape an inquiry into the relationship of the particular employees to the production of goods for commerce. If the work of the employees has only the most tenuous

relation to, and is not in any fitting sense 'necessary' to, the production, it is immaterial that their activities would be substantially the same if the employees worked directly for the producers of goods for commerce.

"We agree, however, with the conclusion of the courts below. In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.'" (pp. 525, 526)

In other words, this Court having in mind the larger considerations of national policy, legislative history and administrative practicalities held that the building service employees in that case who worked in a building in which goods were produced for interstate commerce were themselves engaged in the production of these goods for the reason that their activities sustained such a close relation thereto as to be in reality a part thereof.

In the case at bar the Circuit Court of Appeals, Second Circuit, did not follow the reasoning in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, and failed to make a specific determination that the work of the respondents did or did not have a direct and immediate tie with the production of goods for commerce. If it had pursued this line of reasoning, it is respectfully submitted that the work of the respondents would have been found to have merely a tenuous, remote and insubstantial relation to the production of goods for commerce and that there was not such a close and immediate tie as to bring the respondents within the coverage of the Act.

In disregarding the reasoning of this Court and in arriving at its decision, the Circuit Court of Appeals, Second Circuit, ignored the admonition contained in the following

excerpt from the opinion of this Court in the case of *Gully* v. *First Nat. Bank in Meridian*, 299 U. S. 109, which was quoted with approval by this Court in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517:

> "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which charaterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end." (p. 117)

This Court in defining "necessary" as used in the Statute, has used the terms "close and immediate tie with", "essential part of", "not tenuous" (*Kirschbaum Co.* v. *Walling, Supra*) "intimately related", "connection • • • quite substantial" (*Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 91).

By these definitions, those who are necessary to others who, in turn, are necessary to still others who are engaged in actual production are not themselves engaged in production. Those who are twice removed from production would not have a "close and immediate tie with" production.

If these definitions were not applied, there would be no end to the chain of producers. If elevator operators are producers of goods because they are necessary to stenographers and accountants who are necessary to manufacturing activities in another state, then the bus drivers who bring the elevator man to work, the tailor who cleans the bus driver's uniform and the gasoline station attendant who fills the bus' tank are likewise in a "remote" sense "necessary" to production in distant places.

If these definitions are discarded, then certainly a railroad which transports goods would be necessary to production and thus engaged in the production of goods for commerce. Maintenance-of-way men necessary to railroading would likewise be engaged in production and the

cook who feeds them being necessary to the maintenance of way workers would also be necessary for production and so engaged in production.

But in *McLeod* v. *Threlkeld*, 319 U. S. 491, this Court said, at page 493:

> "McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause."

Other Federal Courts have followed the line of reasoning of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, in determining this same question. In so doing they have invariably held that building service employees in office buildings are not covered by the Act. (See *Bucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied 321 U. S. 769; *Lofther* v. *First Nat. Bank of Chicago*, 48 F. Supp. 692, aff'd 138 F. (2d) 299, C. C. A. 7; *Stoike* v. *First Nat. Bank of City of New York*; 290 N. Y. 195, certiorari denied 320 U. S. 762; *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 817, C. C. A. 5, certiorari denied, 321 U. S. 780; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287, C. C. A. 5, certiorari denied, 318 U. S. 790; *Convey* v. *Omaha Nat. Bank*, 40 F. (2d) 640, C. C. A. 8, certiorari denied, 321 U. S. 78; *Tate* v. *Empire Building Corporation*, U. S. District Court, Eastern District of Tennessee, 2 WH cases, 472, not officially reported, aff'd 135 F. (2d) 743, C. C. A. 6, certiorari denied 320 U. S. 766; *Rosenberg* v. *Semeria*, 137 F. (2d) 742, C. C. A. 9, certiorari denied, *sub nom Semerio et al* v. *Rosenberg*, 320 U. S. 770; *Cochran* v. *Florida Nat. Bldg. Corporation*, 45 F. Supp. 830, aff'd 134 F. (2d) 613, C. C. A. 5; *Blumenthal* v. *Girard Trust Co.*, 141 F. (2d) 849, C. C. A. 3; *Building Service Employees International Union* v. *Trenton Trust Company*, 142, F. (2d) 257, C. C. A. 3; *Hinkler* v. *Eighty-Three Maiden Lane Corporation*, 50 F. Supp. 263; *Callus*

v. *10 East Fortieth Street Building, Inc.*, 51 F. Supp. 528; *Cullen* v. *Stone & Webster*, U. S. District Court, Southern District of New York, 7 WHR 147, not officially reported; *Brandel* v. *Continental Illinois Nat. Bank & T. Co.*, 43 Supp. 781; *Baldwin* v. *Emigrant Industrial Savings Bank*, U. S. District Court, Southern District of New York, 7 WHR 831, not officially reported; *Wideman* v. *Blanchard & Calhoun Realty Co.*, 50 F. Supp. 626. No distinction is made in these cases between the service employees in one office building and those in another, based upon the varying or diversified activities in which the tenants in these office buildings are engaged. Whether the tenants are, among others, the executive and administrative personnel of companies elsewhere engaged in the production of goods for interstate commerce or whether the tenants are engaged in interstate commerce in the building, albeit not engaged there or elsewhere in the production of goods for commerce, all service employees employed in buildings occupied by such tenants have been uniformly adjudged outside the scope of the Act.

The conviction generally prevailed that these decisions settled the law on this subject and that the reasoning of the Courts in these cases would be followed in all similar ones. This conviction was considerably strengthened by the fact that in every case in which building service employees were unsuccessful in the lower courts and applied to the Court for writs of certiorari, their applications to this Court for such writs were denied. (See *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied, 321 U. S. 769; *Stoike* v. *First Nat. Bank of City of New York*, 290 N. Y. 195, certiorari denied, 320 U. S. 762; *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 617, C. C. A. 5, certiorari denied, 321 U. S. 780; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287 C. C. A. 5, certiorari denied, 318 U. S. 790; *Convey* v. *Omaha*

Nat. Bank, 140 F. (2d) 640, C. C. A. 8, certiorari denied, 321 U. S. 78; *Tate* v. *Empire Building Corporation*, U. S. District Court, Eastern District of Tennessee, 2 WH cases, 472, not officially reported, aff'd 135 F. (2d) 743, C. C. A. 6, certiorari denied, 320 U. S. 766; *Rosenberg* v. *Semeria*, 137 F. (2d) 742, C. C. A. 9, certiorari denied, *sub nom Semerio et al.* v. *Rosenberg*, 320 U. S. 770.)

The Circuit Court of Appeals, Second Circuit, however, in deciding the case at bar chose a line of reasoning which, besides being novel and suggestive of legislative rather than judicial functioning, is in conflict with the reasoning in the cases cited above. This conflicting line of reasoning is clearly reflected in the following part of the court's opinion where it interpreted the scope of the language, "engaged * * * in the production of goods for commerce" as used in the Fair Labor Standards Act, for the purpose of ascertaining whether it is broad enough to embrace the respondents:

> "We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process is indeed a truism, but we cannot escape it, once we abandon literal interpretation—a method for more unreliable. * * * We can conjure up no reason that could have induced Congress, having included employees who made tenantable the quarters of artisans and shipping clerks, to exclude those who made tenantable the quarters of the president, the managers, the cashiers, superintendents and the rest."

Summarizing the reasoning of the court in the case at bar it amounts to this, that the answer to the question, whether a given employee comes within the purview of the

Fair Labor Standards Act hinges upon a consideration of the underlying purpose of the Act taken in conjunction with a presumed Congressional determination if this specific employee had been considered by it at the time. This is the first case involving building service employees in which a court has used reasoning of this kind in reaching a decision. It is respectfully submitted that this reasoning is in conflict with the reasoning in the cases hereinbefore cited.

Point III

The Circuit Court of Appeals for the Second Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The question of law in the case at bar is whether the respondents, circumstanced as they are, are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938. This question has not been settled by this Court. It was not directly settled in the case of *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, nor in the case of *Walton* v. *Southern Package Corp.,* 320 U. S. 540, and these are the only cases in which this Court has directly considered the question whether building service employees are within the purview of the Act.

In the cases of *Kirschbaum Co.* v. *Walling, supra,* and *Walton* v. *Southern Package Corp., supra,* this Court held that the work of building service employees therein considered who worked in a building wherein goods were physically produced for commerce had such a close and immediate tie with such production that it was part thereof and that these service employees were therefore covered by the Act. In the case at bar, on the other hand, goods were not produced for commerce in the building wherein the respondents worked but such production was carried on in Petitioner's plants and factories scattered throughout the

United States and Canada and separated from the building in which the respondents worked by hundreds and thousands of miles.

All Federal courts which have passed upon the question have uniformly held that building service employees employed in office buildings are not covered by the Act (see authorities cited in Point II). The decision in the case at bar is the first in which any Federal court has ever finally held that building service employees in office buildings are covered by the Act. This holding has created much uncertainty in the law and a decision by this Court is necessary in order that this uncertainty may be dissipated and the law on the subject settled.

The question of law involved here is an important one. There are thousands of office buildings in the United States where no production takes place but whose tenants produce goods for commerce at plants located wholly outside of and apart from such buildings. A decision of the present judicial controversy therefore will not only settle the issues between the parties-litigant herein but it will also determine the rights and obligations of these building owners and building service employees throughout the United States.

The question of the liability of employers of building service and maintenance employees in such buildings has not yet been determined by this Court. The employers have proceeded on the assumption that the reasoning of the decided cases absolved them from liability but if the decision in the case at bar is not reviewed, there will be great uncertainty. The district courts which are bound by the decision of the Circuit Court of Appeals for the Second Circuit, in the absence of such review, will be required to follow the decision of that Circuit Court of Appeals whereas the district courts controlled by other Circuit Courts of Appeal will arrive at a diametrically contrary result.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari in this case should be granted.

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